



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 5, 2002

Mr. Jason Martinson
Open Records Coordinator
Texas Parks and Wildlife Department
4200 Smith School Road
Austin, Texas 78744-3291

OR2002-6933

Dear Mr. Martinson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 173135.

The Texas Parks and Wildlife Department (the "department") received a request for "information on state jail felonies, major violations resulting in jail terms or fines over \$500 . . . in cases involving whitetail, mule deer, antelope, personal injury and/or large volumes of fish." In your initial correspondence to this office, you claimed that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.117, and 552.137 of the Government Code. In your subsequent correspondence to this office, you do not explain the applicability of these raised exceptions. Rather, you state that the department is withholding the requested information from the requestor based on a previous determination ruling of this office.

When a governmental body seeks to withhold requested information from a requestor, the Act generally requires a governmental body to ask this office whether the requested information is excepted from disclosure under one of the Act's exceptions to disclosure. Gov't Code § 552.301(a). However, where there exists a "previous determination," a governmental body is not required to ask this office for a decision and may instead withhold the information in accordance with the previous determination. *Id.* This office has determined that there are only two instances in which a previous determination under section 552.301(a) exists. *See* Open Records Decision No. 673 (2001). The first instance

of a previous determination applies to specific information that is again requested from a governmental body where this office has previously issued a decision that evaluates the public availability of the precise information or records issued. The first type of previous determination requires that certain criteria be met. However, we need not consider whether the criteria for the first type of previous determination have been met in this instance, as you maintain that the previous determination ruling on which you rely is the second type of previous determination.

The second type of previous determination requires that all of the following criteria be met:

1. the requested records or information at issue fall within a specific, clearly delineated category of information about which this office has previously rendered a decision;
2. the previous decision is applicable to the particular governmental body or type of governmental body from which the information is requested;
3. the previous decision concludes that the specific, clearly delineated category of information is or is not excepted from disclosure under the Act;
4. the elements of law, fact, and circumstances are met to support the previous decision's conclusion that the requested records or information at issue is or is not excepted from required disclosure; and
5. the previous decision explicitly provides that the governmental body or bodies to which the decision applies may withhold the information without the necessity of again seeking a decision from this office.

Specifically, we note that the law, facts, and circumstances on which the prior ruling were based must not have changed in order for a governmental body to rely on the ruling as a previous determination. ORD 673 at 7 n. 8. Absent all five of the above criteria, and unless the first type of previous determination applies, a governmental body must ask for a decision from this office if it wishes to withhold from the public information that is requested under the Act.

The ruling on which you rely as a previous determination is an unnumbered ruling this office issued to the department on July 25, 1979 (the "1979 Ruling"). At issue in that ruling was information concerning persons charged with taking oysters from polluted waters in Galveston Bay, names of persons charged with coastal fishing violations in sixteen counties, and other information about the offenses. The department asserted that the information was excepted from disclosure under former section 3(a)(8) of V.T.C.S. article 6252-17a, the predecessor provision of section 552.108 of the Government Code. The 1979 Ruling held as follows:

Although the information requested here is accessible by type of offense, or location of the offense, as well as by the name of the person accused of an offense, the principle result of disclosure is to identify particular individuals with their criminal history. We agree with the Department's position that this information is excepted from required public disclosure under the holding of *Houston Chronicle Publishing Co. v. City of Houston*, [531 S.W.2d 177 (Tex. Civ. App.-Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). . . . and Open Records Decision No. 144 (1976). We consider these decisions "previous determinations" of the issue within the meaning of that term as used in section 7(a) of the Act, and therefore no further formal determination by this office is required.

Thus, the 1979 Ruling actually concluded that the decisions in *Houston Chronicle* and ORD 144 to be previous determinations. In *Houston Chronicle*, the court determined that a personal history and arrest record, which consists of an individual's chronological history of any arrests, is excepted from required public disclosure under former section 3(a)(8) of V.T.C.S. article 6252-17a. Open Records Decision No. 144 (1976) determined that, based on former section 3(a)(8), the Texas Department of Public Safety may withhold from disclosure conviction information concerning certain named individuals.

We find that the department may not rely on the 1979 Ruling to withhold the requested information because the law on which the 1979 Ruling was based has changed. The Seventy-fifth Legislature significantly amended the law enforcement exception, section 552.108 of the Government Code, in 1997. Act of June 1, 1997, 75th Leg., R.S., ch. 1231, 1997 Tex. Sess. Law Serv. 4697 (Vernon) (effective September 1, 1997). Under the current law enforcement exception, information responsive to a request for criminal records about certain crimes in a certain location does not amount to a request for a compilation of an individual's criminal history and so is not excepted from disclosure as a personal history and arrest record. See Gov't Code § 552.108; see also *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.-Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). Thus, as we have determined that the 1979 Ruling is not a previous determination on which the department may rely to withhold the requested information, we will address the exceptions you raise.

Section 552.301(e) requires a governmental body that requests an attorney general decision to submit to this office within 15 business days after the date the governmental body received the request various information, including a copy of the specific information requested, or a representative sample of the information if a voluminous amount of information was requested. Gov't Code § 552.301(e)(1). The department failed to comply with this submission requirement. Consequently, the information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information. *Id.* § 552.302. The applicability of sections 552.103, 552.107,

and 552.108 does not constitute a compelling reason to overcome the presumption of openness. Thus, you may not withhold the information under section 552.103, 552.107 or 552.108. While the applicability of sections 552.101, 552.117 or 552.137 may be compelling, because you have not submitted the information and explained the applicability of these exceptions, we have no basis for finding the information confidential. Therefore, we conclude that the department must release the requested information to the requestor. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be

sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kay Hastings", with a stylized flourish at the end.

Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 173135

c: Mr. Mark McDonald
34 Herff Road
Boerne, Texas 78006